United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 18-1761**
	)	**Issued: July 8, 2019**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, MIKE MONRONEY AERONAUTICAL CENTER, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 17, 2018 appellant filed a timely appeal from a March 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated September 28, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 25, 2017 appellant, then a 74-year-old aviation safety inspector/instructor/pilot, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to hazardous noise exposure while at work prior to his retirement on July 1, 2014.[2] He noted that he first became aware of his hearing loss and of its possible relationship to his federal employment on July 1, 2014. The claim form indicated August 16, 2017 as the date his condition was first reported to a supervisor. On the reverse side of the claim form, the employing establishment contended that the claim was untimely filed and explained that appellant was informed of the possibility of hearing loss despite the monitoring capability of the employing establishment the date he retired. J.P., a program consultant, noted that the employing establishment did not receive his claim until August 16, 2017, even though appellant's signature on the Form CA-2 was dated April 13, 2017. She confirmed that the employing establishment verified that appellant completed the form in April 2017, but did not submit it until August 16, 2017.

In development letters dated November 13, 2015, OWCP informed appellant and the employing establishment that additional evidence was needed to establish his occupational disease claim. Appellant and the employing establishment were advised of the type of factual and medical evidence needed. He was also provided a questionnaire for completion. OWCP afforded appellant and the employing establishment 30 days to submit additional evidence.

On September 1, 2017 OWCP received a statement from appellant describing his noise exposure from 1988 through his retirement in 2014. Appellant indicated that the employing establishment did not emphasize hearing protection and that he never received a safety briefing on hearing or hearing protection. He also noted that he used headsets for his flight operations; however, he rarely used earplugs. Appellant also noted that over the course of his career as an aviation safety inspector/instructor/pilot, he accumulated over 10,000 flight hours. He indicated that, after he retired from the employing establishment, he noticed significant changes in his hearing, which he initially thought was related to his military career; however, he now believed that his hearing loss also was related to his aviation career. Appellant noted that, since his retirement, employing establishment pilots were added to the employing establishment's hearing conservation program.

In an April 13, 2017 memorandum, Dr. Thomas E. Hatley, a clinical division manager with the employing establishment medical clinic, a specialist in emergency and preventative medicine, informed appellant that he had hearing loss, "possibly while employed in an occupational noise environment." He explained that appellant's hearing loss history was discussed and his audiograms from 1991 to 2004 were reviewed. Dr. Hatley noted that on July 1, 2014 the employing establishment's nurse offered appellant an end-of-service audiogram, which revealed that appellant had "significant hearing changes" during his career. He indicated that, if appellant believed that his hearing loss was related to his noise exposure at work, he was entitled to file an occupational disease claim.

[2] The employing establishment noted that appellant retired on July 14, 2017; however, this appears to be a typographical error, as appellant indicated in response to OWCP's development letter that he retired on July 1, 2014.

OWCP received an employing establishment audiogram test summary report summarizing appellant's audiogram test results from May 16, 1969 to August 12, 2017 and an audiogram report from April 13, 2017.

In a September 12, 2017 statement, appellant described his employment history and noise exposure from 1988 to his retirement on July 1, 2014. He also explained that he submitted the information pertaining to his hearing loss at an earlier date, however, August 28, 2017 was the date that his claim form was signed by the employing establishment.

By decision dated September 28, 2017, OWCP found that appellant's claim was untimely filed. It explained that appellant's claim was not filed within three years of the date of injury and that appellant had not established that his immediate supervisor "had actual knowledge within 30 days of the date of injury." OWCP explained that appellant indicated that his date of injury was July 1, 2014, and his claim was not filed until August 25, 2017.

On January 31, 2018 appellant requested reconsideration.

In a November 28, 2017 memorandum, Dr. Warren S. Silberman, a clinical division manager with the employing establishment medical clinic, Board-certified in internal and preventative/aerospace medicine, addressed the timeliness of appellant's claim. He noted that appellant was exposed to noise, but was not in a hearing conservation program that included instructor pilots. Dr. Silberman indicated that appellant's date of last exposure was July 1, 2014, which coincided with his date of retirement. He also noted that appellant was advised by the occupational health nurse on his exit from the employing establishment that he was possibly exposed to hazardous noise and that the nurse notified the employing establishment safety offices, the program manager, and the commanders through the clinic division manager at that time. Dr. Silberman explained that the "Commandant and others may have not been the first-line supervisor, but were, without a doubt, in the supervisory chain. Subsequent to [appellant's] retirement, [the nurse] used his hearing loss as the basis for redoubling efforts to evaluate the work area and protect the employees remaining on duty."

By decision dated March 19, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a), finding that he did not submit new and relevant evidence or legal argument sufficient to warrant reopening the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[3] OWCP has discretionary authority in this regard and has imposed certain

[3] This section provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

limitations in exercising its authority.[4] One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[5]

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[6] When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[7]

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant submitted relevant and pertinent new evidence not previously considered by OWCP with his January 31, 2018 request for reconsideration. The November 28, 2017 memorandum from Dr. Silberman confirmed that although uncertain of the chain of command, the employing establishment's nurse notified the employing establishment safety offices, the program manager, and the commanders on July 1, 2014 that appellant was possibly exposed to hazardous noise. Dr. Silberman further explained that on April 1, 2017 appellant was assisted in completing a Form CA-2 for filing with OWCP. He noted that "[t]he hard copy filing was not processed by [appellant's] line of business, for they contacted my office advising they did not know what to do with it, but they did, make no mistake, have knowledge of it, and interim possession."

Although OWCP's March 19, 2018 decision found that the evidence on reconsideration was substantially similar to a previous memorandum from the employing establishment, the November 28, 2017 memorandum from Dr. Silberman contains relevant and pertinent new evidence regarding the issue of whether appellant's claim was timely filed.[8] The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of

[4] 20 C.F.R. § 10.607.

[5] *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System. *Id*. at Chapter 2.1602.4b.

[6] *Id*. at § 10.606(b)(3).

[7] *Id.* at § 10.608(a)(b).

[8] *See supra* note 4.

reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.[9] The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(3)(iii), the new evidence in the November 28, 2017 memorandum from Dr. Silberman is sufficient to require reopening appellant's case for further review on its merits.

The Board finds that OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for OWCP to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision on the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: July 8, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[9] *See A.C.*, Docket No. 17-1616 (issued November 27, 2018); *see Helen E. Tschantz*, 39 ECAB 1382 (1988).